BORHAN HJ DAUD & ORS A

v.

ABD MALEK HUSSIN

COURT OF APPEAL, PUTRAJAYA B
RAUS SHARIF JCA
SULONG MATJERAIE JCA
AHMAD MAAROP JCA
[CIVIL APPEAL NO: W-01-122-2007]
25 MARCH 2010 C

CONSTITUTIONAL LAW: *Fundamental liberties - Preventive detention - Detention under Internal Security Act 1960 - Whether there was procedural non-compliance - Whether details of alleged wrongful activity need to be explained to detainee - Federal Constitution, art. 5(3) - Internal Security Act 1960, ss. 8(1), 73(1), (3) Federal Constitution, art. 5(3) - Internal Security Act 1960, ss. 8(1), 73(1), (3)* D

CONSTITUTIONAL LAW: *Legislature - Constitutionality of statute - Whether Internal Security Act 1960 is a valid and constitutional legislation - Federal Constitution, art. 149* E

CONSTITUTIONAL LAW: *Right to counsel - Detention under Internal Security Act 1960 - Deprivation of legal representation during detention period - Whether invalidated detention process - Federal Constitution, art. 5(3)* F

PREVENTIVE DETENTION: *Detention - Detention under Internal Security Act 1960 - Alleged involvement in activities prejudicial to national security - Whether essence and particulars of alleged wrongful activities explained to detainee - Whether arrest and detention unlawful - Whether liable in tort - Federal Constitution, art. 5(3) - Internal Security Act 1960, ss. 8(1), 73(1), (3)* G

PREVENTIVE DETENTION: *Detention under Internal Security Act 1960 - Right to counsel - Deprivation of legal representation during detention period - Whether invalidated detention process - Federal Constitution, art. 5(3)* H

TORT: *Assault and battery - Liability - Detainee claiming to have been humiliated and mentally and physically assaulted while in police custody - Whether allegation of police abuse established on evidence - Whether detainee entitled to general, aggravated and exemplary damages - Quantum* I

A ***TORT:*** *False imprisonment - Claim for damages - Arrest under Internal Security Act 1960 - Allegation that essence and particulars of alleged wrongful activities not explained to detainee - Whether arrest and detention unlawful - Liability - Quantum - Federal Constitution, art. 5(3) - Internal Security Act 1960, ss. 8(1), 73(1), (3)*

B

A group of Special Branch officers led by the 1st appellant, a police officer, had arrested the respondent under s. 73(1) of the Internal Security Act 1960 ("the ISA"). The respondent was blindfolded and taken to the police headquarters ("IPK"). The respondent remained C in police custody for 57 days thereafter. The respondent's case was that his arrest and detention for 57 days was unlawful and that he was assaulted and tortured while he was in police custody. The appellants denied such assault and torture. The learned High Court judge made the following findings: (i) the arrest and detention of D the respondent was unlawful; (ii) the respondent had proved on the balance of probabilities that he was assaulted in the manner he described; and (iii) the respondent was unlawfully denied of his constitutional rights to see a lawyer. The learned High Court judge awarded the respondent general, aggravated and exemplary damages E for unlawful arrest and detention, assault and ill-treatment as well as for oppressive, arbitrary and unconstitutional action. The High Court judge found that the respondent was never properly informed by the 1st appellant of the grounds of his arrest as required under art. 5(3) of the Federal Constitution ("the constitution"). His F Lordship also found that the 1st appellant failed to satisfy the court with sufficient particulars and material evidence of the respondent's activities to justify the arrest and detention of the respondent under s. 73(1) of the ISA. The appellants appealed against the High Court's decision. The 1st appellant claimed that after taking the G respondent to the IPK and after lodging a report, he had prepared a form in compliance with art. 5(3) of the Constitution explaining to the respondent the grounds of his arrest.

Held (allowing the appellants' appeal with cost)
Per Raus Sharif JCA delivering the judgment of the court:

H

(1) The arrest of the respondent was not an ordinary arrest. The respondent was arrested under s. 73(1) of the ISA, a special law made under art. 149 of the Constitution. Article 149 of the Constitution expressly provides that such a law as the ISA is I valid notwithstanding that it is inconsistent with arts. 5, 9 or 10 and 13 of the Constitution; *Kam Teck Soon v. Timbalan Menteri Dalam Negeri Malaysia and Other Appeals* (foll). (paras 19 & 20)

(2) The real issue in the present case was whether what the 1st appellant informed the respondent was sufficient for the purpose of art. 5(3) of the Constitution. What had been communicated to the respondent by the 1st appellant was in sufficient compliance with art. 5(3) of the Constitution. The respondent had admitted that he was informed by the 1st appellant the reasons of his arrest. He was told that he was arrested under the ISA for being involved in activities which was a threat and prejudicial to the security of the country. The form issued by the 1st appellant, further substantiated the fact that the respondent was informed of the grounds of his arrest. (para 25)

(3) The 1st appellant was not required to inform the respondent the grounds of his arrest in detail. It was absolutely legitimate for the 1st appellant to state he had "reason to believe" that there were grounds to justify the respondent's detention under s. 73(1) of the ISA. There is also no requirement for the 1st appellant to satisfy the court with sufficient particulars and material evidence of the respondent's activities to justify the arrest and detention of the respondent under s. 73(1) of the ISA. (para 3)

(4) The forms used under s. 73(3)(a), (b) and (c) are merely administrative forms. Section 73(3) does not refer to any form to be used by the police officers referred to thereunder to exercise their powers. Thus, the insufficient particulars in those forms, will have no legal impact and cannot be considered as a basis for censuring the legality of detention under s. 73(1) of the ISA. There is no requirement to explain and give sufficient particulars in extending the respondent's detention. Since the relevant forms had been signed by the relevant officers of the required rank, the authorisation for the said sub-section had been complied with. (para 36)

(5) A violation of art. 5(3) *ie*, right to access to counsel did not make the arrest and detention *mala fide*. (para 41)

(6) The findings of facts by the learned High Court judge that respondent had been assaulted or tortured was not supported by evidence. The findings were perverse and could not be upheld. As liability was not established against the appellants, there was no question of awarding damages, be it exemplary, aggravated or otherwise. (para 55)

A ***Bahasa Malaysia*** *Translation Of Headnotes*

Sekumpulan pegawai-pegawai Cawangan Khas yang dibawa oleh perayu pertama, seorang pegawai polis, telah menangkap responden di bawah s. 73(1) Akta Keselamatan Dalam Negeri 1960 ('ISA'). Mata responden ditutup dengan pembalut dan dibawa ke Ibu Pejabat Polis ('IPK'). Responden berada di dalam tahanan polis selama 57 hari. Kes responden adalah bahawa penangkapan dan tahanannya selama 57 hari adalah menyalahi undang-undang dan beliau telah diserang dan diseksa semasa dalam tahanan polis. Perayu menafikan berlakunya serangan dan seksaan. Hakim Mahkamah Tinggi telah membuat penemuan-penemuan tersebut: (i) penangkapan dan tahanan responden menyalahi undang-undang; (ii) responden telah membuktikan atas imbangan kebarangkalian bahawa beliau telah diserang dalam keadaan yang telah beliau perihalkan; dan (iii) responden telah dengan secara tidak sah dinafikan hak-hak perlembagaannya untuk bertemu dengan peguam. Hakim Mahkamah Tinggi mengawardkan responden dengan gantirugi umum, teruk dan teladan untuk penangkapan dan tahanan tak sah, serangan dan layanan yang dasyat juga untuk penindasan, arbitrari dan tindakan yang tidak mengikut perlembagaan. Hakim Mahkamah Tinggi mendapati bahawa responden tidak dimaklumkan oleh perayu pertama alasan-alasan penangkapannya seperti yang diperlukan di bawah fasal 5 Perlembagaan Persekutuan ('Perlembagaan'). Hakim juga mendapati bahawa perayu pertama gagal memuaskan mahkamah dengan butir-butir mencukupi dan keterangan material mengenai aktiviti-aktiviti responden untuk memberikan justifikasi untuk penangkapan dan tahanan responden di bawah s. 73(1) ISA. Perayu-perayu merayu terhadap keputusan Mahkamah Tinggi. Perayu pertama mendakwa bahawa selepas membawa responden ke IPK dan selepas membuat laporan, beliau telah menyediakan borang mengikut fasal 5(3) Perlembagaan menjelaskan kepada responden alasan-alasan penangkapannya.

Diputuskan (membenarkan rayuan perayu-perayu dengan kos)
Oleh Raus Sharif HMR menyampaikan penghakiman mahkamah:

(1) Penangkapan responden bukanlah penangkapan biasa. Responden ditangkap di bawah s. 73(1) ISA, undang-undang khas yang dibuat di bawah fasal 149 Perlembagaan. Fasal 149 Perlembagaan dengan jelas menyatakan bahawa undang-undang seperti ISA adalah sah walaupun ia tidak selaras dengan fasal 5, 9 atau 10 dan 13 Perlembagaan; *Kam Teck Soon v. Timbalan Menteri Dalam Negeri Malaysia and Other Appeals* (diikuti).

(2) Isu yang sebenar di dalam kes ini adalah sama ada apa yang dimaklumkan oleh perayu pertama kepada responden adalah mencukupi untuk tujuan fasal 5(3) Perlembagaan. Apa yang telah dikomunikasikan kepada responden oleh perayu pertama adalah pematuhan yang memadai dengan fasal 5(3) Perlembagaan. Responden telah mengakui bahawa beliau telah dimaklumkan oleh perayu pertama alasan-alasan penangkapannya. Perayu dimaklumkan beliau telah ditangkap di bawah ISA kerana terlibat dengan aktiviti-aktiviti yang boleh mengugut dan memprejudiskan keselamatan negara. Borang yang dikeluarkan oleh perayu pertama, seterusnya membuktikan bahawa responden telah dimaklumkan mengenai alasan-alasan penangkapannya.

(3) Perayu pertama tidak perlu memaklumkan kepada responden alasan-alasan penangkapannya dengan butir-butir penuh. Ia adalah sah untuk perayu pertama untuk menyatakan bahawa beliau 'mempunyai sebab untuk percaya' terdapatnya alasan-alasan untuk menjustifikasikan tahanan responden di bawah s. 73(1) ISA. Juga tidak terdapat keperluan untuk perayu pertama untuk memuaskan mahkamah dengan butir-butir yang memadai dan keterangan material mengenai aktiviti-aktiviti responden untuk menjustifikasikan penangkapan dan tahanan responden di bawah s. 73(1) ISA.

(4) Borang-borang yang digunakan di bawah s. 73(3)(a), (b) dan (c) hanyalah borang-borang pentadbiran. Seksyen 73(3) tidak merujuk kepada apa-apa borang untuk digunakan oleh pegawai polis untuk melaksanakan kuasa mereka. Oleh itu, butir-butir yang tidak memadai di dalam borang-borang itu, tidak mempunyai kesan undang-undang dan tidak boleh dipertimbangkan sebagai dasar untuk mengugat kesahan penahanan di bawah s. 73(1) ISA. Tidak terdapat keperluan untuk menjelaskan dan memberi butir-butir yang memadai dalam melanjutkan penahanan responden. Memandangkan borang-borang relevan telah ditandatangani oleh pegawai-pegawai relevan mengikut pangkat yang diperlukan, pemberian kuasa mengikut subseksyen yang disebut telah dipatuhi.

(5) Pencabulan fasal 5(3), contohnya, hak untuk mendapatkan peguam tidak membuat penangkapan dan penahanan *mala fide*.

A **(6)** Penemuan-penemuan fakta oleh Hakim Mahkamah Tinggi bahawa responden telah diserang dan diseksa tidak disokong oleh keterangan. Penemuan-penemuan tersebut adalah tidak wajar dan tidak boleh disahkan. Memandangkan liabiliti tidak dibuktikan terhadap perayu-perayu, tidak wujud persoalan
B mengawardkan gantirugi, sama ada teladan, teruk atau selainnya.

Case(s) referred to:

Abdul Ghani Haroon v. Ketua Polis Negara & Another Application (No 3) [2001] 2 CLJ 709 HC ***(refd)***

China Airlines Ltd v. Maltran Air Corp Sdn Bhd & Another Appeal [1996] 3 CLJ 163 FC ***(refd)***

Chong Kim Loy v. Timbalan Menteri Dalam Negeri, Malaysia & Anor [1990] 1 CLJ 61; [1990] 1 CLJ (Rep) 731 HC ***(refd)***

Choo Kok Beng v. Choo Kok Hoe & Ors [1984] 1 LNS 40 PC ***(refd)***

Coghan v. Cumberland [1898] 1 Ch 704 ***(refd)***

Dalip Bhagwan Singh v. PP [1997] 4 CLJ 645 FC ***(refd)***

Gan Yook Chin & Satu Lagi lwn. Lee Ing Chin & Yang Lain [2001] 1 LNS 255 HC ***(refd)***

Inspector-General of Police & Anor v. Lee Kim Hoong [1979] 1 LNS 34 FC ***(refd)***

Inspector-General Of Police v. Tan Sri Raja Khalid Raja Harun [1988] 1 CLJ 39; [1988] 1 CLJ (Rep) 135 SC ***(refd)***

Johnson Tan Han Seng v. PP & Other Appeals [1977] 1 LNS 38 FC ***(refd)***

Kam Teck Soon v. Timbalan Menteri Dalam Negeri Malaysia & Ors And Other Appeals [2003] 1 CLJ 225 FC ***(refd)***

Lee Ing Chin & Ors v. Gan Yook Chin & Anor [2003] 2 CLJ 19 CA ***(refd)***

Long Samat & Ors v. PP [1974] 1 LNS 80 FC ***(refd)***

Mohamad Ezam Mohd Noor v. Ketua Polis Negara & Other Appeals [2002] 4 CLJ 309 FC ***(refd)***

Patrick Eugene Long v. Menteri Hal Ehwal Dalam Negeri Malaysia & Ors And Other Applications [1976] 1 LNS 132 HC ***(refd)***

Ponnampalam Selvanayagam v. University of West Indies [1983] 1 WLR 585 ***(refd)***

Tan Sri Khoo Teck Puat & Anor v. Plenituded Holidays Sdn Bhd [1993] 2 CLJ 146 SC ***(refd)***

Wong Fook Nyen v. Timbalan Menteri Dalam Negeri Malaysia & Ors [1988] 2 CLJ 274; [1988] 2 CLJ Rep 543 HC ***(refd)***

Legislation referred to:

Criminal Procedure Code, s. 376

Dangerous Drugs (Special Preventive Measures) Act 1985, ss. 3(1), 6(1)

Emergency (Public Order & Prevention of Crime) Ordinance 1969, s. 3(1)

Federal Constitution, arts. 5(3), (4), 9, 10, 13, 145(3), 149, 150

Internal Security Act 1960, s. 73(1), (3)(a), (b), (c)

Penal Code, s. 182

For the appellant - Iznan Ishak AG's Chambers
For the respondent - R Sivarasa; M/s Daim & Gamany

[Appeal from High Court, Kuala Lumpur; Suit No: S3(S5)-21-20-1999]

[Editor's note: For the High Court judgment, please see Abd Malek Hussin v. Borhan Hj Daud & Ors [2008] 1 CLJ 264]

Reported by Amutha Suppayah

JUDGMENT

Raus Sharif JCA:

[1] This is an appeal from the judgment of the High Court at Kuala Lumpur. The High Court had declared that the arrest and detention of the respondent was unlawful, a violation and a breach of the respondent's fundamental rights under the Federal Constitution. The respondent was then awarded damages of RM1,000,000 for false imprisonment, RM500,000 for general damages for assault and ill-treatment and RM1,000,000 for exemplary damages.

[2] The 1st appellant at the material time was a police officer. The 2nd appellant is the Inspector-General of Police, while the 3rd appellant is the Federal Government. The claim against the 3rd appellant is for vicarious liability in respect of the torts of the 1st and 2nd appellants.

[3] We heard the appeal on 8 September 2009. Having heard the parties, we adjourned the matter for our consideration and decision. We now give our decision and the reasons for the same.

[4] The relevant facts of this case are these. At about 10pm on Friday, 25 September 1998, a group of Special Branch officers led by the 1st appellant arrested the respondent. He was arrested in front of his house at Taman Sri Watan, Ampang when he was returning home and after he had just alighted from a car driven by a friend.

[5] The respondent was arrested under s. 73(1) of the Internal Security Act 1960 ("the ISA"). After the arrest, the 1st appellant and his men entered the respondent's house and seized several

documents and items. Thereafter, he was blindfolded and taken to Ibu Pejabat Polis Kontinjen ("IPK") at Jalan Hang Tuah, Kuala Lumpur.

[6] The respondent arrived at the IPK at about 11pm. He was taken up to a room on the first floor. He was there until 4am before being taken to Bukit Aman. He remained in police custody for 57 days until his release on 21 November 1998.

[7] The respondent's case was that his arrest and detention for 57 days was unlawful and that he was assaulted and tortured while he was in police custody. The appellants contended otherwise. Each and every allegations of assault or torture as described by the respondent were denied by the appellants.

[8] After hearing the witnesses for the respondent and the appellants, the learned High Court judge made the following findings:

8.1 The arrest and detention of the respondent was unlawful.

8.2 The respondent had proved on the balance of probabilities that he was assaulted in the manner he described.

8.3 The respondent was unlawfully denied of his constitutional rights to see a lawyer.

[9] After finding that the appellants were liable, the learned High Court judge then considered the issue of quantum of damages and made the following awards:

9.1 General damages of RM700,000 for unlawful arrest and detention for 57 days and adding a further RM300,000 for aggravating factors making it RM1,000,000;

9.2 General damages of RM500,000 for assault and ill-treatment;

9.3 Exemplary damages of RM1,000,000 for oppressive, arbitrary and unconstitutional action; and

9.4 Interest at 8% per annum from the date of judgment until realisation and costs.

Was The Arrest And Detention Of The Respondent Unlawful?

[10] The learned High Court judge in his judgment held that the arrest and detention of the respondent was unlawful for the following reasons:

10.1 The respondent was never properly informed by the 1st appellant of the grounds of his arrest as required under art. 5(3) of the Federal Constitution ("the Constitution").

10.2 The 1st appellant had failed to satisfy the court with sufficient particulars and material evidence of the respondent's activities to justify the arrest and detention of the respondent under s. 73(1) of the ISA.

10.3 The arrest and detention of the respondent were *mala fide*.

[11] The learned High Court judge held that notwithstanding the provisions of the ISA, it is the legal and constitutional duty on the part of the arresting authority to inform the person arrested the grounds of his arrest as imposed by art. 5(3) of the Constitution which provides:

> Where a person is arrested he shall be informed as soon as may be of the grounds of arrest and shall be allowed to consult and be defended by a legal practitioner of his choice.

[12] The learned High Court judge opined that in order to make the constitutional protection meaningful, the "detainee must be told briefly and in clear and simple language that he is being arrested because there is reason to believe that his activities (the gist of which should be intimated to the detainee) have been such as to justify his detention in order to prevent him from acting in a manner prejudicial to the security of the country". In the present case, he found what was informed by the 1st appellant to the respondent regarding his arrest was not sufficient and in violation of art. 5(3) of the Constitution.

[13] Thus, the first issue that calls for our consideration is whether art. 5(3) had been violated. The respondent in his evidence had testified that all that he was told at the point of arrest was that he was being arrested under the ISA. The 1st appellant on the other hand had testified that he had informed the respondent that the

arrest was made under s. 73(1) of the ISA. He told the respondent that he was arrested because he was involved in activities which was a threat and prejudicial to the security of the country.

[14] The 1st appellant further testified that after taking the respondent to the IPK and after lodging a report, he prepared a form in compliance with art. 5(3) of the Constitution explaining to the respondent the grounds of his arrest. The document which was exhibited reads as follows:

> Saya Borhan bin Hj. Daud (G 6724) pada 25 September 1998 jam 2310 hrs telah memberitahu kamu Abdul Malek bin Hussin No. KP 560814-06-5467 sebab-sebab kamu ditangkap di bawah seksyen 73(1) Akta Keselamatan Dalam Negeri 1960 iaitu:
>
> (a) Saya mempercayai ada alasan-alasan untuk menahan kamu di bawah seksyen 8 Akta Keselamatan Dalam Negeri 1960; dan
>
> (b) Saya mempercayai kamu telah bertindak dengan cara yang memudaratkan keselamatan Malaysia.

[15] The learned High Court judge held that even if he were to accept the 1st appellant's version it could not be sufficient compliance of art. 5(3) of the Constitution. According to him, what was said by the 1st appellant did not convey to the respondent the essence of what the respondent was alleged to have done that his detention was necessary to prevent him from acting in a manner prejudicial to the security of Malaysia.

[16] Senior Federal Counsel, Encik Iznan Ishak appearing for the appellants submitted that the learned High Court judge had erred in law when he imposed a duty on the part of the arresting authority to inform the person arrested under s. 73(1) of the ISA of the grounds of arrest. According to him, art. 5(3) of the Constitution did not apply to any arrest under the ISA, which was a preventive law made under art. 149 of the Constitution. He referred to the Federal Court case of *Kam Teck Soon v. Timbalan Menteri Dalam Negeri Malaysia & Ors And Other Appeals* [2003] 1 CLJ 225 ("Kam Teck Soon") to support his argument.

[17] Encik Iznan Ishak further submitted that even if art. 5(3) applied to arrest under s. 73(1) of the ISA, the respondent was in fact informed by the 1st appellant of the grounds of his arrest. According to him, the respondent was informed of sufficient material

evidence and particulars to show the basis of the 'reasons to believe' that the detention of the respondent was necessary to prevent him from acting in a manner prejudicial to the security of the country.

[18] Encik Sivarasa Rasiah, learned counsel for the respondent submitted otherwise. He referred to us the Federal Court case of *Mohamad Ezam Mohd Noor v. Ketua Polis Negara & Other Appeals* [2002] 4 CLJ 309 ("Mohamad Ezam"), which established that the detaining authority must inform the arrested person of the grounds of his arrest and to provide sufficient material evidence and particulars to show the basis of the reasons to believe that the detention of the respondent was necessary to prevent him from acting in a manner which was prejudicial to the security of the country.

[19] At the outset, we need to point out that the arrest of the respondent was not an ordinary arrest. The respondent was arrested under s. 73(1) of the ISA. ISA is a special law made under art. 149 of the Constitution, which provides as follows:

> If an Act of Parliament recites that action has been taken or threatened by any substantial body of persons, whether inside or outside the Federation:
>
> (a) to cause, or to cause a substantial number of citizens to fear, organised violence against persons or property; or
>
> (b) to excite disaffection against the Yang di Pertuan Agong or any Government in the Federation; or
>
> (c) to promote feelings of ill will and hostility between different races or other classes of the population likely to cause violence; or
>
> (d) to procure the alteration, otherwise than by lawful means, of anything by law established; or
>
> (e) which is prejudicial to the maintenance or the functioning of any supply or service to the public or any class of the public in the Federation or any part thereof; or
>
> (f) which is prejudicial to public order in, or the security of, the Federation or any part thereof; any provision of that law designed to stop or prevent that action is valid notwithstanding that it is inconsistent with any of the provisions of Article 5, 9, 10 and 13, or would apart from this Article be outside the legislative power of Parliament and Article 79 shall not applied to a Bill for such Act or any amendment to such a Bill.

[20] As can be seen above, art. 149 of the Constitution expressly provides that such a law as the ISA is valid notwithstanding that it is inconsistent with arts. 5, 9 or 10 and 13 of the Constitution. The Federal Court in Kam Teck Soon had addressed this issue. Ahmad Fairuz CJ speaking for the majority stated at p. 232 as follows:

> Article 149 (1) of the Federal Constitution and Article 150(6) of the Federal Constitution for instance, show clearly how Article 5 cannot apply to arrest 'under any law whatsoever in force in this Country'. ...
>
> In light of Article 150 (2) of the Federal Constitution, s. 3(1) of the Ordinance clearly cannot be contended to be invalid just because it is inconsistent with Article 5(3) of the Federal Constitution. What is the purpose of not invalidating s. 3(1) if it is not for validating an arrest and detention which becomes unlawful due to non-compliance of Article 5(3). I am of the view that if s. 3(1) is inconsistent with Article 5(3) then s. 3(1) must prevail over Article 5(3). This would save the arrest and detention which would have been unlawful because of violation of Article 5(3). This in my view is the purpose of Article 150(6) of the Constitution.

[21] We are bound by the above statement of principle. We are conscious that the above statement of principle was in relation to arrest under s. 3(1) of the Emergency Ordinance Public Order and Prevention of Crimes 1969 (Ordinance), a law made under art. 150 of the Federal Constitution. However, we are of the view that the same interpretation should apply to s. 73(1) of the ISA. This is because the wording of s. 3(1) of the Ordinance is similar to that under s. 73(1) of the ISA in substance.

[22] In fact, the issue on the validity of legislations made under art. 150 or 149 of the Constitution which are inconsistent with the provisions on fundamental liberties as enshrined in the Constitution had been decided in a number of cases. One of such cases is *Chong Kim Loy v. Timbalan Menteri Dalam Negeri, Malaysia & Anor* [1990] 1 CLJ 61; [1990] 1 CLJ (Rep) 731 ("*Chong Kim Loy*"). In that case, the applicant was detained by an order of the Deputy Minister of Home Affairs under s. 6(1) of the Dangerous Drugs (Special Preventive Measures) Act 1985. One of the points argued on behalf of the applicant was that there had been a contravention of art. 5(4) of the Constitution by reason of the fact that the applicant had not been produced before a magistrate within 24 hours after the arrest

and detention at the police station. Edger Joseph Jr J (as he then was) concluded that the powers of preventive detention spelt out in Part II of the Act, in particular s. 3(2) appearing therein, do, in his opinion, make such restriction manifestly clear and was therefore valid notwithstanding that it is inconsistent with art. 5(4).

[23] The case of *Chong Kim Loy* was accepted with approval by the Federal Court in *Kam Teck Soon*. We are aware that what was decided in *Kam Teck Soon* is in conflict with an earlier decision of the Federal Court in *Mohamad Ezam*. In *Mohamad Ezam*, the Federal Court held that the ISA was still subject to the rights entrenched in art. 5(3) and art. 149 could not be used to remove such rights.

[24] The existence of two different schools of thought makes it imperative for us to indicate our choice for a better view. With respect, we subscribe to and agree with the principle propounded in *Kam Teck Soon*. This is especially so when *Kam Teck Soon* is a later decision of the Federal Court. Being a later decision it must prevail over *Mohamad Ezam*. This principle was established by the Federal Court in *Dalip Bhagwan Singh v. PP* [1997] 4 CLJ 645.

[25] However, the real issue in the present case is not so much whether the respondent was informed of the grounds of his arrest. Rather, it is whether what the 1st appellant informed the respondent was sufficient for the purpose of art. 5(3) of the Constitution. It is our considered view that what had been communicated to the respondent by the 1st appellant was in sufficient compliance with art. 5(3) of the Constitution. In fact, the respondent had admitted that he was informed by the 1st appellant the reasons of his arrest. He was told that he was arrested under the ISA for being involved in activities which was a threat and prejudicial to security of the country.

[26] The form issued by the 1st appellant, further substantiated the fact that the respondent was informed of the grounds of his arrest. The relevant part of the form reads:

> ... sebab-sebab kamu ditangkap di bawah seksyen 73(1) Akta Keselamatan Dalam Negeri 1960 iaitu:
>
> (a) Saya mempercayai ada alasan-alasan untuk menahan kamu di bawah seksyen 8 Akta Keselamatan Dalam Negeri 1960; dan

A (b) Saya mempercayai kamu:

(i) telah bertindak dengan cara yang memudaratkan keselamatan Malaysia;

(ii)

B

(iii)

[27] In fact, what is required of an arresting officer to inform a detainee upon arrest under s. 73(1) of the ISA had been clarified in a number of cases. In the Supreme Court case of *Inspector-General* C *Of Police v. Tan Sri Raja Khalid Raja Harun* [1988] 1 CLJ 39; [1988] 1 CLJ (Rep) 135 at p. 140, Salleh Abas LP said:

> In simple language what section 73(1) of the Act provides is that a police officer may arrest any person in respect of whom the police D officer has reason to believe there are grounds to justify the person's detention under section 8 of the Act and that person either has acted or is about to act in a manner prejudicial to the security of the nation. The Penal Code define "reason to believe" to mean "sufficient cause to believe".

E **[28]** In Chong Kim Loy, Edgar Joseph Jr J (as he then was) speaking on arrest under s. 3(1) of the Dangerous Drugs (Special Preventive Measures) Act 1985 (which is in *pari materia* with s. 73(1) of the ISA) had this to say:

F > It is obvious that an arrest by a police officer pursuant to the provisions of s. 3(1) has to be on the ground that he has reason to believe that there are grounds which could justify detention under s. 6(1) and nothing else.

[29] Lim Beng Choon J, in *Wong Fook Nyen v. Timbalan Menteri* G *Dalam Negeri Malaysia & Ors* [1988] 2 CLJ 274; [1988] 2 CLJ Rep 543, speaking on the same subject said at p. 549:

> However the learned counsel went on to contend that even assuming that Inspector Hassan had informed the applicant of the grounds of his arrest as asserted in his affidavit the said "grounds" were H insufficient to satisfy the requirement of Clause 3 of Article 5 of the Constitution. I am afraid I cannot accept such a contention as it has been stated that it is not necessary for a person making the arrest even under the ordinary law to the state the charge in technical or precise language. In the present case the arresting officer had told I the applicant that the grounds of his arrest were that there was

reason to believe that the applicant was associated with activities relating to the trafficking of drugs and that it was necessary in the interest of public order to detain him under s. 3(1) of the Act. What else could we expect the arresting officer to tell him at that stage?

[30] The same requirement was held to be sufficient for an arrest under s. 3(1) of the Emergency (Public Order & Prevention of Crime) Ordinance 1969 (which is in *pari materia* to s. 73(1) of the ISA and s. 3(1) of the Dangerous Drugs (Special Preventive Measures) Act 1985). In *Patrick Eugene Long v. Menteri Hal Ehwal Dalam Negeri Malaysia & Ors And Other Applications* [1976] 1 LNS 132 Arulandon J said:

Counsel for the applicants argues that the affidavits of the officer do not give the grounds and that it is the duty of the courts to look into the grounds and see if the grounds are reasonable and that if the grounds are not reasonable Article 5(3) of the Constitution has been contravened. This submission is wholly without substance. Article 5(3) of the Constitution only states that the person arrested shall be informed as soon as may be of the grounds of arrest and section 3(1) of the Emergency (P.O.P.C.) Ordinance 1969, only state that any police officer may without warrant arrest and detain pending enquiries any person in respect of whom he has reason to believe that there are grounds which would justify his detention under section 4(1). No further conditions are required for a police officer to arrest a person under this section.

[31] Similarly, in *Inspector-General of Police & Anor v. Lee Kim Hoong* [1979] 1 LNS 34, Harun J (as he then was) made the following observation:

I should make it clear that the police are not being called upon to disclose the evidence which led to the arrest and detention but merely the grounds of arrest. All the Police have to say, for example, is that "Lee was arrested because we have reason to believe that is necessary for the prevention of crimes involving violence."

[32] In *Kam Teck Soon*, on arresting the appellant, the arresting officer informed the appellant that he was arrested under s. 3(1) of the Emergency (Public Order and Prevention of Crime) Ordinance 1969 as there was reason to believe that there were grounds that would justify the appellant's detention. However, the arresting officer

A did not disclose to the appellant the information received that caused him to have the reason to believe that there were grounds justifying the detention. The Federal Court held at p. 235:

> Furthermore, s. 3(1) only requires the arresting officer to have
B 'reason to believe that there are grounds ...'. It does not require the grounds to be informed to the arrested person. And even if it is so required because of art. 5(3) of the Constitution, I am of the view that what the arresting officer had informed the appellant was sufficient compliance with art. 5(3). The grounds were those that would justify a detention under s. 4(1) of the Ordinance. Viscount
C Simon in *Christie & Anor v. Leachinsky* [1947] 1 All ER 567 at p. 572, said:
>
> > These citations, and others which are referred to by Lord Du Parcq, seem to me to establish the following propositions:
> >
> D …
> >
> > 4 The requirement that he should be so informed does not mean that technical or precise language need be used. The matter is a matter of substance, and turns on the elementary proposition that in this country a person is, *prima facie*, entitled to his
> E freedom and is only required to submit to restraint on his freedom **if he knows in substance the reason** why it is claimed that this restraint should be imposed. (Emphasis added).
>
> F Obviously the appellant must have known in substance the reason for his arrest i.e. that he was arrested because there were grounds which would justify his detention under s. 4(1) of the Ordinance.

[33] Thus, it is our view that the 1st appellant is not required to inform the respondent the grounds of his arrest in detail. It is
G absolutely legitimate for the 1st appellant to state he has "reason to believe" that there are grounds to justify the respondent's detention under s. 73(1) of the ISA. There is also no requirement for the 1st appellant to satisfy the court with sufficient particulars and material evidence of the respondent's activities to justify the arrest and
H detention of the respondent under s. 73(1) of the ISA. Based on the facts of this case, it is our view that the respondent was informed of the grounds of his arrest. What the 1st appellant informed the respondent was sufficient particulars and thus did not make the arrest and detention of the respondent unlawful.

I

Extension Of The Detention

[34] The learned High Court judge had also found that the extension of the detention of the respondent after the 24-hour detention was not done in compliance with s. 73(3)(a), (b), (c) of the ISA. To understand the learned High Court judge's reasoning, s. 73(3)(a), (b), (c) is hereby reproduced:

> (3) Any person arrested under this section may be detained for a period not exceeding sixty days without an order of detention having been made in respect of him under section 8:
>
> Provided that:
>
> (a) he shall not be detained for more than twenty-four hours except with the authority of a police officer of or above the rank of Inspector;
>
> (b) he shall not be detained for more than forty-eight hours except with the authority of a police officer of or above the rank of Assistant Superintendent; and
>
> (c) he shall not be detained for more than thirty days unless a police officer of or above the rank of Deputy Superintendent has reported the circumstances of the arrest and detention to the Inspector-General or to a police officer designated by the Inspector-General in that behalf, who shall forthwith report the same to the Minister.

[35] The learned High Court judge following the reasoning in his own case of *Abdul Ghani Haroon v. Ketua Polis Negara & Another Application (No 3)* [2001] 2 CLJ 709 found that the forms signed by ASP Koh Seng Keng (SD9) and DSP Cheong Ah Moi (SD10) extending the respondent's detention beyond 24 hours and beyond 48 hours respectively, did not address the legal requirements of spelling out the purpose of the detention and relating it to the "reason to believe" with sufficient particulars. He found that SD9 and SD10 did not explain plausibly why the extensions were needed. He also found that the final extension under s. 73(c) by DSP Philip (SD8) was improper. He gave two reasons. First, there was no documentary evidence to show any instrument that SD8 was the officer designated by the Inspector General. Second, SD8 acted in an automatic and rubber-stamping fashion in extending the detention beyond 30 days.

[36] We would like to point out that the forms used under s. 73(3)(a), (b) and (c) are merely administrative forms. Section 73(3) does not refer to any form to be used by the police officers referred to thereunder to exercise their powers. Thus, the insufficient particulars in those forms, will have no legal impact and cannot be considered as a basis for censuring the legality of detention under s. 73(1) of the ISA. Section 73(3)(a), (b) and (c) only require that any extension must be authorised by the police officers of the relevant rank. There is no requirement for the SD9, SD10 and SD8 to explain and give sufficient particulars in extending the respondent's detention. In this case, the relevant forms have been signed by the relevant officers of the required rank. It indicates that the authorisation for the said sub-section have been complied with. A close and careful reading of s. 73(3)(a), (b) and (c) indicate that it is never the intention of the legislature for the officers authorising the further detention to state or explain the reasons for authorising the detention.

[37] A big issue was created by the learned High Court judge as to the absence of documentary evidence to show that SD8 was the officer designated by the Inspector General under s. 73(3)(c) to report to the Minister on the Inspector General's behalf. But, had the learned High Court judge evaluated the evidence of SD8, he would have found that SD8 was the designated officer of the Inspector General. In fact, upon reading through the record, the document would have been produced if the learned High Court judge had allowed the request of the Senior Federal Counsel to adjourn the re-examination of SP8 on the following day so as to enable SD8 to produce the document.

[38] Clearly, the learned High Court judge had exceeded his jurisdiction by enlarging the meaning of s. 73(3)(a)(b) and (c). He had extended the meaning to include imposing a duty on the police officers to disclose the particulars as a basis to extend the detention or state the reasons for further extension of the detention in which Parliament had never intended.

Mala fide

[39] The learned High Court judge had also found the arrest and detention of the respondent to be *mala fide*. He gave two reasons. First, no material particulars or evidence was ever produced to the court to substantiate that the respondent 'terlibat secara langsung di

dalam perhimpunan haram yang di mana setiap perhimpunan haram tersebut diakhiri dengan kacau bilau dan mengganggu ketenteraman awam'. Second, the respondent was not given the right of access to counsel throughout his detention.

[40] With respect, the above two reasons cannot be used as a basis of declaring the arrest and detention of the respondent under s. 73(1) of the ISA to be *mala fide*. As stated earlier, the arrest of the respondent was made under the ISA. It is a special law which is valid even though it contains provisions inconsistent with the provisions on fundamental liberties under the Constitution. As pointed out earlier, an arrest and subsequent detention under the ISA does not require the detaining authority to disclose material evidence and sufficient particulars as to the reasons for his arrest and further detention. Even in ordinary law, it is not a requirement for the arresting authority to state the offence or charge in technical and precise language. Thus, the question of *mala fide* has not been substantiated.

[41] With regard to the respondent's right to counsel, we are aware that Siti Normah Yaacob FCJ (as she then was) in *Mohamad Ezam* had held that the ISA made no provision for denial of access to legal representation which would be inconsistent with art. 5(3), and that art. 149 could not be used to remove such rights. However, as we indicated earlier, we preferred the principle decided in Kam Teck Soon, as the better one. We hold that a violation of art. 5(3) ie, right to access to counsel does not make the arrest and detention *mala fide*.

Was The Respondent Assaulted?

[42] The respondent alleges that he was first assaulted by the 1st appellant immediately after his arrest. According to him, he was slapped by the 1st appellant when he was unable to take the 1st appellant to the location of his car. The respondent also said that his head was forcibly covered with t-shirt and forced to bend down between his legs in the car as he was taken to IPK Kuala Lumpur. The respondent alleged further assault which, according to him took place at the IPK. In summary, he described how in the air-conditioned room on the first floor of the IPK, he was stripped naked, blindfolded, verbally abused and then physically assaulted. He was hit several times on the face and head. Most of the blows and

kicks were directed at his body and legs. His legs were hit with a hard object. He felt over several times as a result of the blows. At an instance when his blindfold slipped, he identified one assailant as the 2nd appellant in person (ie, Tan Sri Rahim Noor). The respondent also alleged that after the episode of physical assault liquid smelling like urine was poured into his mouth which was forced open. Throughout the ordeal, he was forced to remain naked. His penis was hit and an object pushed against his anus. He was made to stand in front of an air-conditioner and drilled with water.

[43] The learned High Court judge accepted it as a fact that the respondent had been assaulted in the manner described by the respondent. The learned Senior Federal Counsel submitted that the findings of facts by the learned High Court judge were based on inferences and not supported by evidence and ought to be set-aside. Learned counsel for the respondent, on the other hand submitted that this court should not interfere with the findings of facts by the learned High Court judge. He referred to us the cases of *Tan Sri Khoo Teck Puat & Anor v. Plenituded Holidays Sdn Bhd* [1993] 2 CLJ 146, *Ponnampalam Selvanayagam v. University of West Indies* [1983] 1 WLR 585, *China Airlines Ltd v. Maltran Air Corp Sdn Bhd & Another Appeal* [1996] 3 CLJ 163 and *Choo Kok Beng v. Choo Kok Hoe* & Ors [1984] 1 LNS 40 to support his submission.

[44] We are aware of the principles established in those cases. But there are instances where appellate intervention are permissible (See *Coghan v. Cumberland* [1898] 1 Ch 704, *Lee Ing Chin & Ors v. Gan Yook Chin & Anor* [2003] 2 CLJ 19 and *Gan Yook Chin & Satu Lagi lwn. Lee Ing Chin & Yang Lain* [2001] 1 LNS 255). These cases established that appellate intervention is permissible where it can be shown that there has been no or insufficient judicial appreciation of the evidence by a trial judge.

[45] The present case is a clear example where a trial judge failed to appreciate sufficiently the evidence adduced before him. It is our view that on the evidence adduced, the learned High Court judge's findings of facts were clearly against the weight of evidence. We say so for the following reasons. First, the respondent did not make his police report on the alleged assault or torture immediately after his release from detention. He was released on 21 November 1998. However, the police report was only made on 13 March 1999. There was a delay of about 3 1/2 months. The delay raises doubt as to

the credibility of the alleged assault. No doubt the respondent did explain the delay in making the report but in our view, his explanation was not credible and should have been rejected by the learned High Court judge.

[46] Second, the coloured photographs taken by SD4 did not indicate any injury to the respondent consistent with continuous and violent assaults as alleged by the respondent. The photographs were taken at four in the morning of 25 September 1998 - ie, they was taken immediately after the respondent had alleged being beaten up by the police. But none of the photographs show any trace or mark, indicating the respondent was assaulted while he was in custody of the 1st appellant.

[47] Third, we have the evidence of SD6, who conducted the body search on the respondent. According to SD6, he conducted a physical body check on the respondent on 26 September 1998 at 1pm ie, few hours after the alleged assault. He described the condition of the respondent as follows:

> Plaintif kelihatan sihat, ceria dan tidak menunjukkan apa-apa tanda bahawa beliau mengalami kecederaan. Cuma secara imbas lalu saya nampak ada sedikit kesan kemerahan pada kedua-dua belah pergelangan tangan plaintif.

SD6 had also testified that the respondent had not made any report of any assault by the police to him. And he did not see any mark on the respondent body.

[48] Fourth, we have the evidence of Dr Vasanty (SD7) who examined the respondent on 29 September 1998 ie, four days after the alleged assault. In her report, SD7 had stated the condition of the plaintiff as follows:

> Present Complaints
>
> Patient complained of pain left foot, left thigh, left leg and low back. He complained of alleged fall on 25 September 1998. He also complained of pain over pelvis and right eye.
>
> Physical Examination
>
> Local Examination
>
> Pelvis - no swelling, no tenderness

A Spine - no swelling, no tenderness

Range of movement lumbosacral spine-flexion limited due to pain

Rest of movements-full range

B Patient able to move all his joins

Eyes - not congested no flourescein uptake. Fundus - nothing abnormal detected

Vision - patient able to read tiny print

C Bruises over both wrists

Bruise over postero-lateral aspect of left thigh (mid-thigh area)

Bruise over postero-lateral aspect of left leg

D Patient was given Ponstan and Papase to treat his complaints.

[49] SP7 in her evidence testified that the respondent did not complaint of any assault or torture by the police to her. Instead, he informed SP7 that the pain on the left foot, left thigh, left leg and E low back was the result of an alleged fall on 25 September 1998. Nowhere did the respondent complained of the alleged assault or the inhumane treatment by the police to SP7.

[50] Thus, the learned High Court judge's presumption and inferences that the respondent was in fact assaulted was completely F misplaced. He erred when he said that the unwillingness of the deputy public prosecutor (DPP) to prosecute the respondent for lodging a 'false' report against the Inspector General and the 1st appellant indicated that there must be some truth in the report made by the respondent. G

[51] In this case, the police had recommended that the respondent be charged under s. 182 of the Penal Code for making a false report but the DPP had directed the police to take 'No Further Action' ("NFA") on the file. But the learned High Court judge had used H the said decision of the DPP to draw some adverse inferences against the appellants. The learned High Court judge posed the following questions:

(a) Why did it take nine months for the DPP to respond to I SD11's recommendation?

(b) Why didn't SD11 or his Supervisor (SAC Mat Zain) send any reminder to the DPP's office when the DPP's office took such a long time to respond?

(c) Why did the DPP's office purposely ignore the recommendation of the police that the plaintiff be charged for making a false report against the IGP?

(d) Why were SD11 and SAC Mat Zain not serious in pursuing the recommendation with the DPP's office when a very serious and scandalous accusation had been formally made against their IGP but, instead, were quick to have the investigation file closed?

[52] Based on the above observations and queries, the learned High Court judge drew an inference that the DPP's office, SAC Hadi Ho (SD11) and SAC Mat Zain well knew that there was a lot of truth in the respondent's police report against the Tan Sri Rahim Noor and the 1st appellant. The learned High Court judge then concluded that the investigation carried out by SD11 in respect of the respondent's police report was nothing but a mere sham. He took the DPP to task over the decision of the DPP to direct 'NFA' on the file, and concluded that the DPP must be called by the appellants to explain the delay in deciding the case.

[53] With utmost respect, we are of the view that the unwillingness of the DPP to charge the respondent for making false report cannot be used as a basis to infer that the DPP and the police were trying to cover up the case. It is an established fact that the DPP and the police are under two separate organizations, with separate powers and responsibility under the law. There is no necessity for the DPP to explain to the court as to the delay in making the decision in not charging the respondent. In this respect, the learned High Court judge had overstepped his duty when he made such statement which can be understood to mean that if there is a delay in investigation and in making a decision to prosecute an offender, it must be presumed that the police and the DPP were working together in cahoot to conceal the truth and that they were acting in *mala fide*. Such allegations are very serious allegations which require proof and not mere inferences.

[54] We were also unable to appreciate why the learned judge could easily conclude that the investigation carried out by SAC Ho (SD11) in respect of the respondent's police report was 'nothing but

A a mere sham'. In his evidence SD11 had stated that he had recorded 33 statements from witnesses including the IGP as well as the respondent. From the investigations, he had recommended to his supervisor, SAC Mat Zain for the respondent to be charged for making a false report. According to him, his supervisor agreed with
B his recommendation but the DPP decided otherwise. In this regard it must be stated that in arriving at the decision whether or not to institute a charge against any person, the DPP is not bound by the recommendation by the police. The decision to charge or not is clearly within the discretion of the DPP in exercising the powers of
C the public prosecutor which is enshrined in art. 145(3) of the Constitution and s. 376 of the Criminal Procedure Code. Apart from being in touch with the police and other investigating agencies, the public prosecutor has information not available to the courts and on which to base his decision on whether or not to prosecute and if
D so on which charge. Anyone who is dissatisfied with the public prosecutor's decision not to prosecute, or not to go on with a prosecution or his decision to prefer a charge for a less serious offence when there is evidence of a more serious offence, should seek his remedy elsewhere, but not in the courts (See *Long Samat*
E *& Ors v. PP* [1974] 1 LNS 80, FC, and *Johnson Tan Han Seng v. PP & Other Appeals* [1977] 1 LNS 38, FC). In our view the decision of the DPP not to prosecute the case alone without more does not make the investigation carried out by the police to be 'nothing but a mere sham'.

F

[55] In our judgment, the findings of facts by the learned High Court judge that respondent had been assaulted or tortured is not supported by evidence. The findings were perverse and cannot be upheld. It must be set-aside. As liability is not established against
G the appellants, there is no question of awarding damages, be it exemplary, aggravated or otherwise which the respondent sought in the statement of claim.

[56] For the reasons given above, the appellants' appeal is allowed.
H The orders of the High Court against the appellants are set-aside. The respondent to pay the costs here and in the court below.

I